Supreme Court, U.S.
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Supreme Court of the United States

MIHAE LEE and JUNGIL LEE
Petitioners,

v.

WILLIAM J. POLICASTRO, TYRONE M. MCDONNELL, KALEBIC, POLICASTRO & D'AMICO, and KALEBIC, POLICASTRO & MCDONNELL, and CHANG JOON AN, CHANG MI KIM, SEUNG WHAN KIM, AN & KIM REALTY, HY DESIGN REALTY CORP. And MAURIZIO VALENTINO, INC., and JOHN J. IDOUCHI,
Respondent-defendants.

On Petition For A Writ of Certiorari To The Supreme Court of New Jersey

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The New Jersey Rules for judgment non-obstante verdict (JNOV) and for directed verdict following a trial mirror the Federal Civil Rule counterparts for summary judgment, judgment as a matter of law. *See N.J. Court Rule 4:40-1* (JNOV); *N.J. Court Rule 4:37-2(b)* (directed verdict); *Fed. R. Civ. P. 50(a); Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) (discussing the identical nature of Federal Rules 50(a) and 56); *Brill v. Guardian Life Insurance Company of America*, 142 N.J. 520, 539-40 (1995) (NJ Supreme Court's adoption of the *Anderson-Liberty Lobby* standards into the State involuntary dismissal regime).

The judicial function involved in deciding a motion for JNOV is "quite a mechanical one. The trial court is not concerned with the worth, nature or extent (beyond a scintilla) of the evidence, but only with its existence, viewed most favorably to the party opposing the motion." *Castro v. Helmsley Spear, Inc.*, 150 N.J.Super. 160, 164-164 (App.Div.1977) citing *Dolson v. Anastasia*, 55 N.J. 2, 5-6 (1969). While in certain circumstances a new trial may be ordered, "[a] judgment [n.o.v.] may not be granted merely because the verdict is contrary to the weight of the evidence." *Wenner v. McEldowney & Co.*, 102 N.J.Super. 13, 22 (App.Div.1968).

In the trial case below, defendants successfully opposed plaintiffs' summary judgment motion filed September 14 , 2004 by arguing that there were substantial issues of material fact. Pa81 to Pa217. The case proceeded to a jury trial and, after nearly a month of jury trial, the jury returned a verdict of liability and assessed damages against the lawyer-defendants, and allocated a "fault percentage" against the third-party defendant, also a lawyer. In a post-trial

motion for JNOV, the trial court committed an about-face and granted JNOV by substituting its own judgment in place of the jury.

The trial itself was severely and irreparably flawed. The lawyer-defendants (principally Policastro and McDonnell) were charged by plaintiffs of representing both parties to a property foreclosure case (the Kim family) and the Petitioners; and the lawyer-defendants were charged with representing all three parties to the foreclosure work-out stemming from the underlying property foreclosure case — the Kim family, Petitioners and the proverbial "White Knight," one Richard Steier. Steier paid the lawyer-defendants a massive sum of money, $105,000.00, to acquire the subject property from the property owner, Kim family, by effectively destroying their other clients' (the Petitioners') rights in relation to the Kim family. The lawyer-defendants essentially received bribery payments of $105,000.00, but, in a shocking and indefensible development, the trial court precluded evidence of that fact as "prejudicial beyond probative" evidentiary ruling under N.J. Rule of Evidence 401, 403, which too is identical to the Federal counterparts.

Petitioners respectfully maintain that review is proper under Rule 10(c) because New Jersey has wrongfully eliminated their jury trial right, and their jury trial verdict, by an impermissible *post-hac* review of the case, that arose against petitioners' due process rights. The issues before the Court are:

1. Whether New Jersey violated petitioners' due process rights by dismissing their action after a proper jury verdict.

2. Whether New Jersey violated petitioners' due process rights by insulating evidence of bribery payments in

a breach-of-fiduciary case against their own former lawyers, who received such payments from a third-party, who ultimately acquired petitioners' property-interest.

LIST OF PARTIES

The parties who participated at the Supreme Court of New Jersey were Petitioners Mihae Lee and Jungil Lee and the Respondents William J. Policastro, Tyrone M. McDonnell, Kalebic, Policastro & D'Amico, and Kalebic, Policastro & McDonnell.

Defendants in the trial court were the same as the foregoing and also included third -party defendant was John J. Idouchi.

Named defendants Chang Joo An, Chang Mi Kim, Seung Whan Kim, An & Kim Realty, Hy Design Realty Corp. and Maurizio Valentino, Inc., could not be served as they absconded after defaulting on the "Side Agreement" at the heart of this matter.

CORPORATE DISCLOSURE

Not applicable.

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OPINIONS BELOW

The judgment of the New Jersey Supreme Court, filed December 11, 2009, is set forth at App-1. The judgment and opinion of the Superior Court, Appellate Division, filed September 22 , 2006, is set forth at App-3. The judgment and opinion of the Superior Court, Law Division, filed December 20, 2006 , is set forth at App-30.

STATEMENT OF JURISDICTION

The New Jersey Supreme Court issued a final order in the case, denying discretionary review by certification on December 11 , 2009. The Court has jurisdiction under 28 U.S.C. § 1254(1) and Rule 13.1 of the Supreme Court Rules.

RELEVANT CONSTITUTIONAL PROVISION

U.S. Const. Amend XIV - due process of law

> . . . nor shall any state deprive any person of life liberty, or property, without *due process of law*, ...

[Emphasis added]

N.J. Constitution, Article I

> 9. The right of trial by jury shall remain inviolate; but the Legislature may authorize the trial of civil causes by a jury of six persons. The Legislature may provide that in any civil cause a verdict may be rendered by not less than five-sixths of the jury. The Legislature may authorize the trial of the issue of mental incompetency without a jury.

RELEVANT RULES

Federal Rule of Civil Procedure 50. Judgment as a Matter of Law in a Jury Trial; Related Motion for a New Trial; Conditional Ruling:

(a) Judgment as a Matter of Law.

(1) In General. If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may:

(A) resolve the issue against the party; and

(B) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.

(2) Motion. A motion for judgment as a matter of law may be made at any time before the case is submitted to the jury. The motion must specify the judgment sought and the law and facts that entitle the movant to the judgment.

N.J. Rule of Court 4:37-2(b):

4:37-2. Involuntary Dismissal; Effect Thereof

(b) At Trial — Generally.

> After having completed the presentation of the evidence on all matters other than the matter of damages (if that is an issue), the plaintiff shall so announce to the court, and thereupon the defendant, without waiving the right to offer evidence in the event the motion is not granted, may move for a dismissal of the action or of any claim on the ground that upon the facts and upon the law the plaintiff has shown no right to relief. Whether the action is tried with or without a jury, such motion shall be denied if the evidence, together with the legitimate inferences therefrom, could sustain a judgment in plaintiff's favor.

N.J. Rule of Court 4:40-1:

4:40-1. Motion for Judgment at Trial

> A motion for judgment, stating specifically the grounds therefor, may be made by a party either at the close of all the evidence or at the close of the evidence offered by an opponent. If the motion is made prior to the close of all the evidence and is denied, the moving party may then offer evidence without having reserved the right to do so. A motion for judgment which is denied is not a waiver of trial by jury even if all parties to the action have so moved.

STATEMENT OF THE CASE

This case commenced in September of 2003 and involves the closing of title from the sale of a commercial building known as 550 Main Street, Fort Lee, New Jersey.

After the original complaint was filed and Defendants filed their Answer, Petitioners sought leave to amend the Complaint in November of 2005. That motion was granted; and the First Amended Complaint was filed in January of 2006. The First Amended Complaint includes a description and a history of the facts that are pertinent to this matter, and Petitioners specifically adopt it, as if fully set forth herein. Pa 655-1052.

Beginning in or around September of 1997 the defendant Kim family obtained various loans totaling $7 million from Korea First Bank, by mortgaging their properties, including the property located at 550 Main Street. The Kim family persuaded petitioners Mihae Lee and Jungil Lee to sign a personal guaranty to secure the loan. By March of 1997, the Kim family became unable to make their payments on the loans and agreed to accept a third mortgage in the amount of $500,000 from petitioners. Third party defendant and lawyer, John Idouchi, prepared and recorded the mortgage on or around June 10, 1997.

In May 1997, Korea First Bank instituted a foreclosure action against the Kim family defendants. The bank advised petitioners that, as guarantors of the Kim family's debts, they would be sued as well. In or around July of 1997, defendant Chang Joo An, on behalf of the Kim family made an agreement with Richard Steir, that Steir would invest in the property and Chang Joo An would have a 45% interest in the business to be developed. It was at this same time, during July of 1997, that Korea First Bank commenced a foreclosure action against petitioners on their personal residence, located at 77 Churchill Road, Cresskill, New Jersey.

On August 5, 1997, the lawyer-defendants opened a new account, knowing that Richard Steir would allocate $2.5 million towards the purchase of the 550 Main Street property,

on the condition that it was free of all mortgages and liens. On August 11, 1997, the lawyer-defendants filed an answer in the Kim family defendants' foreclosure action. The Kim family also referred Petitioners to their own lawyers, and specifically to defendant Policastro, to represent the Petitioners in the foreclosure proceeding that had been filed against their Cresskill home. Clearly, there was a conflict of interest in such a relationship. Nevertheless, the lawyer-defendants conveniently ignored that conflict, as well as the competing interests and objectives between the Kim family and Petitioners, and agreed to represent Petitioners. At the trial, defendant Policastro stated that he never told Petitioners that the third mortgage was a problem. He simply assumed that the Petitioners knew that the third mortgage was a problem because, according to Defendant Policastro, the Kim family told them there was a problem. Incredibly, he still insisted that there was no conflict in his firm's representation of both of the parties. (See T15: 104 lines 18-24, 105 lines 1-7) The lawyer-defendants never disclosed the fact that they were already committed to the sale of the 550 Main Street property. Instead, the lawyers advised Petitioners that they were merely defending the foreclosure suit.

Since the lawyers knew that the purchaser, Richard Steir, would only go through with the closing if he obtained clean title, they had to devise a way to have Petitioners relinquish their third mortgage on the property. Thus, they drafted a "Side Agreement" which provided that Petitioners would receive a payment of $200,000 from the closing proceeds. Paragraph 2 of the Side Agreement states as follows:

> Chang Joo An agrees to pay $200,000 to Jungil Lee and Mihae Lee from the purchase of the property *at the closing*. Pa 040 [Emphasis

added.]

The lawyers also drafted a "Discharge of Mortgage," a legal instrument which extinguished Petitioners' third mortgage position in the property, converting that interest into a $200,000 right to be paid "at the closing." Even though Petitioners' third mortgage was for $500,000, Petitioners relied on the advice of the lawyers and executed the Side Agreement and the Discharge of Mortgage, with the expectation that they would receive $200,000 at the closing. The defendant-lawyers tendered delivery of the Petitioners' Discharge of Mortgage without ever receiving the funds. Moreover, not only did Petitioners never receive the $200,000 they were promised, but Korea First Bank foreclosed on a residential property owned by Petitioners in Korea. In addition, the bank sought $100,000 to settle the foreclosure suit relating to their residential property in Cresskill, New Jersey. Having suffered such a vast amount of financial damage, Petitioners instituted this litigation to recoup what they had lost as a result of the conduct of the Kim family defendants and the lawyer-defendants. Petitioners had hoped to be reimbursed for the damages sustained as a direct consequence of trusting "their" attorneys and friends.

REASONS FOR GRANTING A WRIT

I

PETITIONERS WERE DENIED THEIR RIGHTS TO DUE PROCESS AND TRIAL BY JURY AS NEW JERSEY INVALIDATED A VALID JURY VERDICT

A state court's action, whether under a statutory scheme or judicial common law, to award a judgment in a civil action, constitutes "state action" under the Fourteenth

Amendment. *New York Times Co. v. Sullivan*, 376 U.S. 254, 264 (1964), which implicates due process. *See Shelley v. Kraemer*, 334 U.S. 1, 13 (1948); *Paul v. Watchtower Bible & Tract Soc'y*, 819 F.2d 875, 880 (9th Cir. 1987) (discussing "State laws whether statutory or common law . . . constitute state action."); *Summit Medical Associates, P.c. v. James*, 984 F. Supp. 1404 (M.D. Ala 1998) (*citing Shelly v. Kraemer*). Petitioners have been denied their rights to due process and to trial by jury by New Jersey state courts' invalidation of the proper jury verdict.

"An essential characteristic of [the court] system is the manner in which, in civil common-law actions, it distributes trial functions between judge and jury and, under the influence — if not the command — of the Seventh Amendment, assigns the decisions of disputed questions of fact to the jury." *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 432 (1996) (*citing Byrd v. Blue Ridge Rural Elec. Cooperative, Inc.*, 356 U.S. 525, 537 (1958)).

A. *Respondents' Motion for JNOV Was Impermissibly Granted*

In ruling on a motion for judgment notwithstanding the verdict, "the court must accept as true all the evidence which supports the position of the party defending against the motion and must accord that party the benefit of all legitimate inferences which can be deduced therefrom. Thus, if reasonable minds could differ, the motion must be denied." (*See R.* 4:40-2, Comment 1.) The test's purpose is to ensure that the jury resolves disputed factual matters. *Lewis v. Am.Cyanamid.*, 155 *N.J.* 544, 567 (1998). In *Velazquez v. Jimenez*, 336 *N.J.Super.* 10 (App.Div.2000), the trial judge set aside the jury verdict and entered a judgment n.o.v. *sua sponte*, dismissing a case against a doctor who had been found 3% negligent. The Appellate Division overruled the decision

of the trial court because reasonable minds could differ in determining whether the doctor's negligence was a substantial factor in causing the death of a child. Thus, a reasonable jury could, and did, find against the doctor based on the evidence, even when the evidence was viewed most favorably to the doctor.

The judicial function involved in deciding a motion for j.n.o.v. is "quite a mechanical one." The trial court is not concerned with the worth, nature or extent (beyond a scintilla) of the evidence, but only with its existence, viewed most favorably to the party opposing the motion." *Castro v. Helmsley Spear, Inc.*, 150 *N.J.Super.* 160, 164-164 (App.Div.1977) citing *Dolson v. Anastasia*, 55 N.J. 2, 5-6 (1969). While in certain circumstances a new trial may be ordered, "[a] judgment [n.o.v.] may not be granted merely because the verdict is contrary to the weight of the evidence." *Wenner v. McEldowney & Co.*, 102 *N.J.Super.* 13, 22 (App.Div.1968).

The question of proximate causation of damages was appropriately submitted to the jury in this case. Obviously, the jury found that the damages suffered by the Petitioners were caused by the wrongful and deceptive practices of the defendants. The next step in the process is for the jury to make a determination as to the amount of damages which would *reasonably compensate* Petitioners for their losses. *See, e.g., Commonwealth Land Title v. Conklin Associates*, 152 *N.J. Super.* (Law Div. 1977), *aff'd.*, 167 *N.J. Super.* 392 (1979), *cert. denied*, 81 N.J. 285.

Froom v. Perel, 377 *N.J. Super.* 298, 315 (App. Div. 2005) sets forth the standard by which proximate cause is determined in legal malpractice cases. In that decision, the

Appellate Division stated that:

> . . . in cases involving transactional legal malpractice, there must be evidence to establish that the negligence was a substantial factor in bringing about the loss of a gain or benefit from the transaction. Where, as here, a plaintiff alleges that he suffered a loss in a particular transaction because an attorney failed to take steps to protect his interest, the plaintiff must present evidence that, even in the absence of negligence by the attorney, the other parties to the transaction would have recognized plaintiff's interest and plaintiff would have derived a benefit from it. *See also Blackhawk Building Systems, Ltd. v. The Law Firm of Aspelmeier, et al.*, 428 *N.W. 2d.* 288, 290-91 (Iowa 1988) (attorney's negligent failure to include a non-competition clause in an employment agreement was not the proximate cause of injury because plaintiff did not prove that employee would have agreed to that clause.)

In our case, were it not for the fact that the Defendants fraudulently induced the Petitioners' loss, by having them sign a document that they knew would never be honored, Petitioners would have, at the very least, been restored to their position as holder of the third mortgage. It is evident, from the jury's verdict, that the jurors understood that Petitioners lost a benefit. The trial court should not have disturbed that verdict, as it clearly placed the liability on defendants, as a result of their egregious conduct. Rather than viewing the jury's determination "

most favorably to the party opposing the motion," (i.e., Petitioners) the lower courts construed it in a light most favorable to Respondents and granted JNOV "merely because the verdict is contrary to the weight of the evidence." New Jersey's JNOV procedure, therefore, can invalidate any jury verdict, and no trial conducted in good faith is beyond post-hac reproach as JNOV.

The trial court, in its explanation as to the ruling in support defendants' motion for j.n.o.v. stated that it found that "reasonable minds could not differ on the issue of whether the absence of an escrow provision in the Side Agreement was a proximate cause of the loss of Petitioners' mortgage interest and rights under said agreement." (*See* September 22, 2006 Memorandum of Decision, p. 10, Pa 2671.) The trial court stated that "the issue of whether the mortgage discharge should have been filed or held in escrow was of no consequence, as either way, the same end result would have occurred." (*See* September 22, 2006 Memorandum of Decision, p. 10, Pa 2671.) The trial court's conclusion, in this regard, however, is erroneous. Petitioners were damaged in this case because defendants tendered the Discharge of Mortgage without securing the consideration therefor, which was $200,000. Their own lawyer assured Petitioners that they would receive $200,000 at closing, yet failed to advise them that the closing was proceeding as they spoke. The fact is, neither the lawyer-defendants nor the Kim family defendants ever intended for Petitioners to receive the $200,000. They were eager for the sale to go through to Richard Steier, the so called "white knight" who had come along to save the building from foreclosure. As long as the third mortgage placed on

the property by the Petitioners-Lees was discharged, both the attorneys and the Kim family would be free to reap the benefits of the sale.

A case decided by the New Jersey Supreme Court, entitled *VRG Corp. v. GKN Realty Corp.*, 135 *N.J.* 539 (1994) involved the sale of a shopping center. The purchaser failed to insist at the closing that the unpaid commission be put into escrow to secure its right to payment. Counsel conceded at the oral argument in that case that creation of an escrow to protect the client would have been a "more prudent business judgment." *Id.* at 558. Similarly, in *TABAAC v. Atlantic City*, 174 *N.J.Super.* 519, 528 (1980), where negotiations were going forward for the purchase of property, but the true value of the property was in question, money was placed in escrow to secure an agreement to purchase while these factors were being figured out. Thus, placing money in escrow is a fundamental step in those type of matters and this should have been done by defendant McDonnell when plaintiffs tendered the Discharge of Mortgage. Contrary to what the trial judge maintained, the outcome, or end result, would have been very different. The Petitioners would have had their $200,000.

Remarkably, although defendants tried to establish through the testimony of their expert, Gary L. Falkin, Esq., that there was no proximate causation, their own expert contradicted their defense upon cross examination. Mr. Falkin admitted that, once there was a separate agreement, that agreement had a value of its own. If the Lees did not sign the agreement, it is highly likely that the deal would not have gone through. This is because Mr.

Steier insisted that the third mortgage be extinguished before any deal was consummated. All of the law firm defendants were aware of this, which is why it was so urgent that the side agreement be signed and the Lees continue to believe that they were getting their money shortly. Had the Lees not relied upon their obtaining $200,000 immediately, they would have never relinquished their rights to a $500,000 third mortgage.

B. *Expert Testimony Was Not Required*

The principle issue in this case was whether or not the attorneys, including but not limited to Tyrone McDonnell, exercised due care and the skills ordinary to the average member of their profession, in protecting the interest of their clients, Mihae and Jungil Lee. When presented with this question, the jurors may easily conclude without the assistance of expert testimony, that the attorneys conduct was unreasonable and negligent. In fact, the jurors did conclude that the Defendants were liable for the damages suffered by the Lees in this case. Petitioners offered George Conk, Esq., as an expert in the field of legal malpractice, to testify in this case. Nevertheless, even without Mr. Conk's testimony, the jury could have found liability on the part of the Defendants because the lapse in the standard applied to lawyers was so blatant that it would fall within the common knowledge and experience of laymen.

When a case involves negligence or malpractice on the part of a professional, such as a physician or a lawyer, in many instances expert testimony is needed to establish what the standard demands of the professional, and

whether there has been a deviation from that standard. Where, however, there has been a deviation in the standard that is obvious, and would be within the common knowledge of laymen, expert testimony is not required. For example, in *Steinke v. Bell*, 32 *N.J. Super.* 67 (1954) the deviation from the standard of care by a dentist was such that a jury could easily understand it, and expert testimony was not needed. In that case, the court stated that "[w]e think laymen, looking at this case in the light of their common knowledge and experience, can say that a dentist engaged to remove a lower left second molar is not acting with the care and skill normal to the average member of the profession if, in so doing he extracts or causes to come out an upper right lateral incisor. Expert testimony was therefore not necessary under the circumstances of this case." *Id.*, at 70. *See also Carbone v. Warburton*, 22 *N.J. Super.* 5, 22 (App. Div. 1952) *affirmed* 11 N.J. 418 (1953).

The instant matter is analogous to the *Steinke* case, *supra*. Here the Petitioners had a $500,000 third mortgage on the property that was being foreclosed upon. They gave up their rights to the $500,000, in executing the Discharge of Mortgage so that they could obtain $200,000 right away, at the closing. It is clear that Petitioners would not discharge a mortgage if they expected to receive no benefit. Their expectation was that they would have their money immediately. The reason that they did not get their money and, in fact, had no recourse by which to obtain same, was because the attorneys did not put it in escrow. Had they done so, the money would have been there and available to Petitioners. This concept is relatively simple and straightforward. Even without the

testimony of Petitioners' expert, Mr. Conk, the jury could have come to the decision that they came to in this case; that the Defendants acted outside of the professional standard of care in not protecting their clients, and were, therefore, liable.

Other New Jersey cases have held that expert testimony is not necessary when the facts of the case are such that the issues to be resolved are within the common knowledge of laymen. In *Friel v. Vineyard Obstetrical and Gynecological Professional Association*, 166 *N.J. Super.* 579 (1979), a patient gave birth to a brain damaged baby after being left alone by the attendants while in labor. The court found that the question of malpractice where there was an utter lack of attendance at the time in which a baby was delivered was within the province of the laymen of the jury. It stated that "[t]here are basic aspects of childbirth procedure within the common knowledge of the laity," *citing Lewis v. Read*, 80 *N.J. Super.* 148, 170 (App. Div. 1963), *certif. granted*, 41 *N.J.*121 (1963). Thus expert testimony was not required in that case.

Here, it can be said that certain aspects of foreclosure proceedings and discharge of a mortgage would fall within the parameters of a jury's common knowledge. Understanding that any money to be tendered should be placed into escrow is a fundamental idea that any reasonable layperson on the jury could be expected to be aware of. Even without the benefit of expert testimony on this issue, the jury would have been able to reach the same conclusion that they reached at trial; that the Defendants were responsible for the damages suffered as

a result of a deviation from an accepted standard

II

NEW JERSEY'S EVIDENTIARY EXCLUSION OF THE BRIBERY PAYMENTS UNDER A "BALANCING" OF 401 AND 403 FACTORS WAS PALPABLY IMPERMISSIBLE AND IN VIOLATION OF PETITIONERS' RIGHTS TO DUE PROCESS AND TRIAL BY JURY ON THE VERY ISSUE BEING CONFRONTED, NAMELY BREACH OF FIDUCIARY DUTY THROUGH A BRIBE

In or around August of 1997, while the lawyer Defendants were representing the Kim family in a foreclosure suit, they also began to represent the Petitioners in a parallel foreclosure proceeding against the same bank. In the midst of this conflicting representation of both the Kims and the Lees, the lawyer Defendants entered into two secret agreements with Richard Steier. The first agreement was for $100,000 and the second agreement was for $10,000. Richard Steier was ultimately able to reduce the amount of the second agreement by $5,000. Thus, Richard Steier actually paid the law firm defendants $105,000. Plaintiffs' position is that it is necessary to show that these payments were made and Defendants accepted that money, thereby breaching their fiduciary duty to the Lees.

These payments were, in part, a motivating factor for the lawyer defendants to breach the agreement with

the Petitioners and extinguish the third mortgage in any way they were able. As such, these payments and this agreement go to the very core of the lawyer Defendants' misconduct, and are an essential element of the case.

The trial court granted Defendants' motion to bar any testimony or information relating to the fee agreement that was made between the Defendants and Richard Steier. On June 7, 2006, before the commencement of the trial, the court ruled as follows: "Accordingly, I am — and there is no expert, I've reviewed both expert reports, and neither expert talks about this particular document or that particular relationship. Accordingly, I'm going to grant the motion to bar any testimony of the fee agreements." *See* T2: 39 lines 11-15.)

In ruling that the fraudulent bribery payments, or any reference thereto, was inadmissible at the time of the trial, the court effectively destroyed the entire foundation of the plaintiffs' case. The jury should have had the opportunity to consider and evaluate the dealings of the parties in their entirety, including the fraudulent bribery payments. It would have given the jury a truer, more complete picture of what occurred in this case, and it would have been in the jury's discretion to make certain that the petitioners were compensated for the damages sustained. Without having heard about these very crucial and significant events that occurred in this matter, the jury got only a partial, and misleading presentation.

The bribery payments would have clearly shown defendants' breach of fiduciary duty. *See, e.g., Packard-Bamberger & Co. v. Collier*, 167 N.J. 427 (2001)

(discussing that a legal malpractice case is a form of breach of fiduciary duty).

Before the commencement of the trial, several motions were decided by the trial judge. The trial court granted the motion made by defendants to bar any testimony relating to the fee agreement that was negotiated between the law firm Defendants and Richard Steier. (*See* T2: 39 lines 11-15.) Later, Petitioners' counsel explained that it was necessary for the jury to hear about the payments made by Steier because it "clearly goes to show motive and intent to deceive the Lees and to forego their rights." (*See* T7: 109 lines 12-18.) The trial court refused to permit it, and rationalized it as "more prejudicial than probative." Thus, in addition to not allowing this very important testimony, which formed the basis of the defendants' motivation to eradicate the third mortgage, Petitioners were unable to introduce evidence of, or testimony relating to payments of $105,000 made to the law firm defendants by Mr. Steier. This information should have been available for the jury's consideration as evidence of the clandestine dealings that were occurring among the lawyer defendants, the Kim family and Mr. Steier.

By its very nature, all evidence that tends to show a breach of fiduciary duty is "more prejudicial than probative" to the opponent of the evidence. In all cases of "bribery," however, even in aiding and abetting cases, the *act of bribery* must be permitted to be shown to the fact-finder to establish, or reject, the claim of "fiduciary duty" breach. *Judson v. Peoples Bank & Trust Co.*, 25 N.J. 17, 29, 134 A.2d 761 (1957); *In re Integrity Ins. Co.*, 240

N.J.Super. 480, 502-03, 573 A.2d 928 (App.Div. 1990); *Franklin Med. Assocs. v. Newark Pub. Schs.*, 362 N.J.Super. 494, 510, 828 A 2d 966 (App.Div. 2003); *Jaclyn, Inc. v. Edison Bros. Stores, Inc.*, 170 N.J.Super. 334, 368, 406 A.2d 474 (Law Div. 1979) (third party who knowingly aids and abets the agent of another in breach of the agent's fiduciary duty by tendering bribes to the agent, is liable to the principal for commissions paid). While the lawyer-defendants were "aiding and abetting" their principals the Kim family, they were also aiding and abetting their other principal, Richard Steier, against their other principals, Petitioners.

Petitioners called Richard Steier as a witness in the case. However, his testimony was severely limited by the trial court. As Petitioners' counsel noted, Mr. Steier was to testify that as of July 1997, when he got involved with Mr. An to acquire the rights of the Kims, An was shaking him down for money. As Petitioners' counsel explained: "And one of the items that he shook down was the $105,000 legal fee payment to the Policastro firm for the – foreclosure and work out services of the Kim family, Judge. And that's all linked. And that all occurred between the signing of the contract with Mr. Steier on September 16, 1997 and the closing in late October '98. (*See* T8: 10 lines 17-25, 11 lines 1-2.)

Petitioners' counsel attempted to explain as follows, "the events were not only ongoing but the April '98 so-called agreement was merely an agreement to pay fees for the Kim family's work out and foreclosure." (*See* T8: 12 lines 6-9.) The reason Petitioners' called Mr. Steier as a witness was so that he could specifically testify about the

$105,000 fee payment. This was not allowed because the judge found that "the prejudice clearly outweighs any probative value this testimony has." (*See* T8: 12 lines 19-20.) The court would not even allow Petitioners to ask how much total legal fees the Policastro firm received. As Petitioners' counsel pointed out, such testimony would be relevant "because it goes to show—the amount of money goes to show the preference for the Kim matter and Mr. Policastro's disposition and bias, Judge." Petitioners' counsel reminded the Court about what this case was about, when he stated that, "Money is the biggest inducer of all." (*See* T17: 105 lines 11-19.)

In addition, even though there had been previous evidence regarding the fact that the Lees' third discharge of mortgage was the only document filed without escrow, the trial court would not allow Mr. Steier to answer any questions with respect to that issue. (*See* T10: 65 lines 2-12.)

Petitioners' expert, George Conk, was also barred from making any reference to the $100,000 in fees and costs that Mr. Stier had tendered to the defendants for the reasons previously set forth concerning the rationale the court used to grant the motions that were previously filed beginning with the motions in limine up through and including yesterday with Mr. Stier's testimony. The prejudice from that outweighs any probative value.(*See* T10: 6 lines 15-23.) However, on redirect examination when Mr. Conk was asked the difference between what the printed language says and the addition of the handwritten language, he was allowed to answer that over the objections of Petitioners' counsel. (*See* T10: 94 lines 3-

12.)

The trial court barred any evidence or testimony relating to the Petitioners' property in Cresskill, New Jersey. Despite this ruling, this issue was brought up repeatedly by both defense counsel. Defense counsel admitted, "Well, we talked about Cresskill on the foreclosure." (*See* T5: 60 lines 15-16.) However, when Petitioners' counsel made reference to the Cresskill property, the testimony was barred. Petitioners' counsel stated that the Cresskill property had been brought up repeatedly and that "We're not asking for damages. We're talking about communications and course of dealings in this relative time span." (*See* T5: 60 lines 22-24.) The Court sustained the objections and would not allow the testimony.

The trial court also barred any evidence or testimony relating to Petitioners' property in South Korea. The property in South Korea was foreclosed upon by the Korea First Bank in or around February of 1998. The Petitioners surrendered the property in South Korea because they were specifically told by the law firm defendants not to take any action. Although Petitioners argued that this is within the common knowledge exception, thereby eliminating the need for expert testimony on that issue, the court disagreed, stating, "I do not think this is a common knowledge case." (*See* T2: 56 lines 17-25.) Thus, the court eliminated another piece to the puzzle in allowing a jury to understand what actually took place in this case.

Petitioners were not permitted to elicit testimony

from Mrs. Lee with respect to the value of the home in Cresskill. This ruling was made despite the fact that Ms. Lee is a real estate broker and was going to be proffered as a lay person with the requisite knowledge to testify in her own case. The trial court would not allow it because Ms. Lee "is not a licensed appraiser." (*See* T2: 62 lines 18-25.)

The trial judge would also not permit Petitioner Jun Gil Lee to testify about the agreement between Chang Joo An and Richard Steier. When asked about the Side Agreement, Mr. Lee obviously recognized it and was able to identify it. He testifies that it "is a binding agreement between Chang Joo An and Richard Steier." (*See* T3: 26 lines 15-19.) Although Mr. Lee had knowledge about the document, he was unable to testify about it because the court sustained the objections of defense counsel. (*See* T3: 28 lines 1-5.)

In the course of his testimony about the side agreement, and the reasons why he gave up the third mortgage on the property, Mr. Lee referred to a document confirming that An had a forty five percent interest in the property. Mr. Lee testified that:

McDonnell said there is a document that can prove that he has a 45 percent interest. So not to worry and to sign the papers. I requested the copy of that document. He said he would — when he returns to his office, he's going to give it to me." (*See* T3: 40 lines 13-17.) When counsel attempted to refresh Mr. Lee's recollection with the document that was given to Mr. Lee by Mr. McDonnell, which he testified about, the trial court would

not allow the exhibit to be placed into evidence. Similarly, when Mr. Lee testified that he learned through discovery that the third mortgage could not be restored to original status because "this was not allowed by the law," the trial court struck the testimony and instructed the jury to disregard it. (*See* T3: 46 lines 9-16.)

Petitioner Jun Gil Lee was unable to testify about anything that occurred at the conference at the defendants' law firm because he misunderstood a question about telephone conversations with defendant Policastro. When asked whether he had spoken with Mr. Policastro after September 16, 1997, Petitioner Lee replied "No." (*See* T3: 48 lines 16-18.) When Petitioners' counsel then attempted to ask Mr. Lee about the conference attended by both him and his wife in 1998, the trial court would not allow the testimony. Because the trial court found that Mr. Lee should have understood that speaking to the law firm, or communicating with law firm also encompassed attendance at a conference, he would not allow any testimony about the conference in 1998. (*See* T3:51 lines 5-14.) Despite the fact that the conference was an important part of the events that took place and the dealings between Petitioners and Defendants, the jury was not permitted to hear Mr. Lee's testimony about what happened there. Petitioners' counsel later objected to this again, because of the unfair latitude given to both Mr. Carey and Mr. Quinn (defense counsel) in asking multiple questions on a given issue. Petitioners' counsel stated, "When I was questioning Mr. Lee on direct and he gave an affirmative answer on a point and I tried to clarify that answer, Your Honor precluded me from reposing that question. I'm suggesting that that should not be

precluded in that fashion because we're dealing with an interpreter." (*See* T5: 36 lines 10-15.) Petitioners' counsel tried to explain the difficulty in translating the English language into Korean because "[i]t is not active like the English language, so you can't do a simultaneous translation like the English and Spanish languages can accommodate.....the interpreter has to wait until the speaker has spoken and then interprets the entire speech from recognition and then does the same thing at every turn." (*See* T5: 36 lines 20-21, 37 lines 2-5.) This is a significant factor in dealing with a trial of this nature, and the trial court should have recognized that and made less stringent rulings in those instances where it may have been the interpretation that was leading to a misunderstanding. Petitioners' counsel was even precluded from reading a document in order to put it into context for the witness. (*See* T5: 38: 8-18.)

On the other hand, when defense counsel asked questions on cross examination, that were suggestive of a Statute of Limitations defense and highly prejudicial, the trial court allowed it. After testifying that he sued the defendants in 2003, Mr. Lee was asked, "And that was many years, well more than six years after they had gotten you involved in this deal, true?" (*See* T3: 66 lines 10-12.) Even Mr. McDonnell's defense counsel commented that "Judge, you're—you're suggesting that this lawsuit is somehow improper as to the defendants." (*See* T3: 68 lines 2-4.) In addition, defense counsel was permitted to ask about the financial statement that was made by an accountant for Hy Design, even though there had been a previous ruling that there could be no such inquiry. (*See* T4: 13 lines 16-25, 14 lines 1-16.)

Similarly, defense counsel was permitted to use Ms. Lee's deposition testimony when asking about the signing of the retainer agreement , despite the fact that he had already testified at length about the signing of the agreement and when that took place. Petitioners' counsel objected to the use of the deposition as follows: "Mrs. Lee's deposition is not an appropriate medium for asking Mr. Lee whether his recollection is refreshed. Mr. Lee testified unequivocally on multiple occasions today that he signed the agreement in August of 1997." (*See* T5: 74 line 25, 75 lines 1-4.) Still, the court permitted the use of the deposition testimony by defense counsel because Mr. Lee attended that deposition. Defense counsel improperly repeated the exact same questions over and over again. As Petitioners' counsel noted, "The same questions were repeated five, six times on every turn, Judge." (*See* T5: 32 lines 15-16.) This happened during Ms. Lee's testimony, as well. Not only was defense counsel allowed to ask Ms. Lee hypothetical questions, but she was asked again and again about a note that she wrote, even after she testified that she did not recall exactly when, where or why she wrote it. Ms. Lee stated in one of her responses, "I'm not sure if it was Helen Kim, but you keep asking about this, so I – my response was that I speculated. It could have been Helen Kim." (*See* T6: 112 lines 3-5.) Ms. Lee was so harassed by the continuous, same questions, that she felt compelled to simply speculate so that she could have an answer. Even when defense counsel went far beyond the scope of the direct examination during cross examination, the court allowed it. When on cross, Ms. Lee was asked about the promissory note, Petitioners' counsel reminded the court that the subject was extensively covered the week before, and there was already testimony by the witness that she

considered it to be a guarantee. (*See* T7: 68 lines 14-15.)

The trial court did not allow the September 9, 1998, letter from the Policastro firm to be introduced into evidence. Petitioners' counsel sought to introduce the letter to show the timing of the representation by the firm, as well as the fact that the settlement was made by Mr. Policastro and later completed by a subsequent attorney on the terms that were negotiated by the Policastro firm. (*See* T7: 79 lines 19-23, 80 lines 24-25, 81 lines 1-5.)

Petitioners also called a witness, Wayne Stahlmann, to testify as a fact witness whose office handled the closing of the property. Petitioners' counsel was unable to refer to the closing as a "closing" because the Judge felt that that particular word had an ultimate outcome. Petitioners' counsel stated, "Judge, if you don't let me use the word closing in the sense of attending an event, I can't get that message across, Judge. I'm talking what is a factual matter." (*See* T7:103 lines 4-7.) By insisting that the closing be referred to as a "meeting", much of the significance of what took place on that day was lost on the jury.

One ruling made by the trial court effectively decimated Petitioners' entire case with respect to what proofs and evidence would be permitted for the jury's consideration. Approximately half way through the trial, the judge dismissed all of the fraud allegations presuming that the jury would not be able to find evidence of fraud in the transaction. This was vehemently opposed by Petitioners' counsel, he stated, "The fraud allegations related to two core sets of facts. First of all, that they

induced an attorney-client relationship in July and August, 1997, and thereafter on the basis of their assurance that they have no conflict of interest and we know that as soon as their representation began there was a conflict of interest." This not only eliminated the cause of action for fraud but also removed any possibility of obtaining punitive damages in the case. This was, for the sole reason, that the judge's opinion was as follows: "I cannot conceive of any jury finding that fraud occurred in this particular case. I'm going to grant this motion." *(See* T10: 124 lines 4-6.)

The trial judge allowed Idouchi to testify at length about the underlying instruments and the $500,000.00 mortgage, despite the fact that they were not at issue in the case. Petitioners counsel made an application to terminate the line of questioning on the grounds that it was excessive and would be confusing to the jury. Nevertheless, Petitioners' application was again denied. (*See* T10: 178 lines 4-7.)

The trial court further erred in failing to grant jnov or new trial based on the clear evidence that the *minimum threshold of damages was $200,000* and the $100,000 amount awarded by the jury was a mistake, particularly given the jury's determination that the lawyer-defendants were entirely at fault (90/10) and Petitioners were not at fault at all. The trial court's errors were each, and cumulatively, so unfair to Petitioners that Petitioners were deprived of a fair trial. There is no possible rationale for protecting the lawyer-defendants "back door" receipt of $105,000 misinformation leading to their Discharge of Mortgage being tendered without the bargained-for

consideration stated in their Side Agreement. When the trial court held that the evidence of such duplicitous dealings was "prejudicial" beyond its probative value, the regrettable ruling insulated defendants' clearly-fraudulent acts against Petitioners and prevented the true facts from being exposed in favor of the persons who were under the "care" of the lawyer-fiduciaries.

Evidence of the fee agreement and the payments made by Steier are not only probative of fiduciary duty but also of the fraud allegations. Petitioners should have had the opportunity to demonstrate this to the jury. It is clear that the elements of fraud are present in this matter. Common law fraud requires proof of five elements. These are as follows: (1) a material misrepresentation of a presently existing or past fact; (2) knowledge or belief by the defendant of its falsity; (3) an intention that the other person rely on it; (4) reasonable reliance thereon by the other person; and (5) resulting damages. *Gennari v. Weichert Co. Realtors*, 148 *N.J.* 582, 610 (1997).

Promises made without the intent to perform them are unquestionably included within the first element, since they are "material misrepresentations of the promisor's state of mind at the time of the promise." *Dover Shopping Center, Inc. v. Cushman's Sons, Inc.*, 63 *N.J. Super.* 384, 391 (App. Div. 1960); *accord, Lipsit v. Leonard*, 64 *N.J.* 276, 283 (1974). Here, the defendants that were also lawyers induced Petitioners to rely on them and pay their retainer fees in exchange for their legal competence and protection of Petitioners' rights. They stated and represented that they were able to provide competent services through completion of the Petitioners'

legal matter. However, these defendants stopped rendering services and stopped protecting petitioners long before petitioners even consulted with John Idouchi, Esq. The lawyer-defendants provided statements that were completely false and gave erroneous advice as to the efficacy and the timing of the Side Agreement. Defendants' intent fits squarely within the case, and intent related facts preclude summary judgment. For these reasons alone the fraudulent bribery payments and anything relating thereto should have been presented to the jury.

In addition, the Side Agreement clearly provided that Chang Joo An was to pay the sum of $200,000 to Jun Gil Lee and Mi Hae Lee from the purchase of the property "**at the closing**." Defendants have claimed that this did not literally mean "at the closing." Yet, there is no ambiguity in the statement. There is no stated condition for the payment at the closing, other than the tender of plaintiffs' Discharge of Mortgage, which was also prepared by defendants. The document was signed and given to the defendants so that they would receive the funds *at the closing*, just like the Agreement states.

At the trial, it was noted that Defendant Policastro stated in a Certification that Chang Joo An made an agreement with the Lees to pay them "$200,000 in the future in exchange for the discharge of a 500,000 dollar third mortgage interest they possessed on the warehouse property." However Defendant Policastro had to acknowledge that was not what the Side Agreement stated. On the contrary, as Petitioners' counsel pointed out, the Agreement provided that "Chang Joo An agrees to

pay $200,000 to Jungil Lee and Mihae Lee from the purchase of the property at the closing." (*See* T16: 117 lines 3-16, 118 lines 4-15.) If Petitioners' version of events had been allowed to be presented, defendants would have been liable for fraud. All of the elements of fraud have been established.

CONCLUSION

For the foregoing reasons, Petitioners Jung Gil Lee and Mi Hae Lee respectfully request that this Court grant petition and reverse New Jersey's judgments that are challenged here, and to restore the jury verdict.

Dated: Englewood, NJ
April 27, 2010

Respectfully submitted,

Michael S. Kimm

Appendix A

SUPREME COURT OF NEW JERSEY
C-425 September Term 2009 064674

MICHAEL LEE, ET AL.,
PLAINTIFFS-PETITIONERS,

v. ON PETITION FOR CERTIFICATION

WILLIAM J. POLICASTRO, ET AL.,
DEFENDANTS/THIRD PARTY
PLAINTIFFS-RESPONDENTS.

FILED
DEC 11 2009
/s/Clerk

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-002033-06 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied, with costs.

WITNESS, the Honorable Virginia A. Long, Presiding Justice, at Trenton, this
9th day of December, 2009.

/s/ CLERK OF THE SUPREME COURT

The foregoing is a true copy
of the original on file in my office.

/s/ CLERK OF THE SUPREME COURT OF NEW JERSEY

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION
SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION
DOCKET NO. A-2033-06T3
MIHAE LEE and JUNGIL LEE,
Plaintiffs-Appellants,
vs.
WILLIAM J. POLICASTRO, TYRONE M. MCDONNELL, KALEBIC, POLICASTRO & D'AMICO, and KALEBIC, POLICASTRO & MCDONNELL,
Defendants/Third-Party Plaintiffs-Respondents,
and
CHANG JOO AN, CHANG MI KIM, SEUNG WHAN KIM, AN & KIM REALTY, HY DESIGN REALTY CORP. and MAURIZIO VALENTINO, INC.,
Defendants,
vs.
JOHN J. IDOUCHI,
Third-Party Defendant-Respondent.

Argued: April 22, 2009 - Decided: July 31, 2009
Before Judges Cuff, Fisher and Baxter.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-6629-03.

Michael S. Kimm argued the cause for appellants (Kimm Law Firm, attorneys; Mr. Kimm and Kim E. Sparano, on the brief).
Thomas F. Quinn argued the cause for respondent William J. Policastro (Wilson, Elser, Moskowitz, Edelman & Dicker LLP, attorneys; Mr. Quinn, of counsel and on the joint brief; John P. O'Toole, on the joint brief).

Christopher J. Carey argued the cause for respondents Tyrone M. McDonnell, Kalebic, Policastro & D'Amico, and Kalebic, Policastro & McDonnell (Graham Curtin, attorneys; Mr. Carey, of counsel; Mr. Carey, Adam J. Adrignolo and William D. Tully, Jr., on the joint brief).

PER CURIAM

This is a transactional legal malpractice action relating to discharge of a mortgage. Plaintiffs Mihae Lee and her husband, Jungil Lee, held a third mortgage on commercial property owned by several non-attorney defendants. After the bank that held the first and second mortgages initiated foreclosure proceedings, the owners of the property found a buyer who required the discharge of plaintiffs' third mortgage as a condition of the sale. Plaintiffs entered into a side agreement with a non-party to discharge their mortgage in return for $200,000 payable at closing. Attorney-defendants released the discharge to the buyer prior to closing and plaintiffs were never paid.

Plaintiffs alleged that Kalebic, Policastro & D'Amico[1] (attorney-defendants) committed legal malpractice by failing to escrow the discharge of mortgage. They also sued attorney-defendants for breach of contract, violation of fiduciary duty, fraud, and spoliation of evidence. Plaintiffs asserted federal and state RICO claims against all defendants. Attorney-defendants filed a third-party complaint against another attorney, John J. Idouchi, alleging he represented plaintiffs in the formation and execution of the side agreement that required the discharge of the third mortgage.

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[1] The firm subsequently reformed as Kalebic, Policastro & McDonnell

The legal malpractice claims against attorney-defendants and third-party defendant Idouchi were the only claims that proceeded to trial. The jury returned a verdict in favor of plaintiffs and awarded them $100,000, apportioned 90% to attorney-defendants and 10% to Idouchi. All parties moved for judgment notwithstanding the verdict (JNOV). Judge Martinotti granted attorney-defendants' motion and dismissed the complaint with prejudice. The judge held as a matter of law the failure to escrow the discharge was not a proximate cause of any harm incurred by plaintiffs. The firm subsequently reformed as Kalebic, Policastro & McDonnell.

On appeal, plaintiffs argue that Judge Martinotti erred in granting attorney-defendants' motion and that he erred during the trial by excluding key evidence, extending the trial date, dismissing the counts in the amended complaint, denying their summary judgment motion, and failing to enter default judgment against non-attorney defendants. We affirm.

A description of the business relationship among plaintiffs, the Kim family, Chang Joo An, Hy Design Realty Corp. (Hy Realty), Hy Design Office Furniture, Inc. (Hy Furniture), and Maurizio Valentino, Inc. (MVI) is in order to understand the context in which plaintiffs received a third mortgage from the Kims and executed the discharge of the third mortgage that is at the heart of this litigation.

Plaintiffs came to the United Sates from Korea in 1992 and bought a house in Cresskill. Jungil Lee worked in the Manhattan office of his Korean employer. Mihae Lee's parents introduced the couple to Seung Whan Kim and his wife, Chang Mi, who was a cousin of plaintiff Mihae Lee. The couples soon became friends.

The Kims were principals of Hy Realty located in Fair Lawn, which owned three parcels of real property: a 4.7 acre commercial parcel in Fort Lee, a commercial parcel in Palisades Park, and another commercial parcel in Fair Lawn. The Fort Lee property contained an abandoned warehouse and eleven other buildings ranging from twenty to one hundred years old. The Kims were also principal owners of Hy Furniture which imported furniture from China. It did business as MVI and operated from the property in Fair Lawn.

In May 1994, plaintiff Jungil Lee joined Hy Furniture as vice-president. He was supposed to be a partner and receive equal shares in the company. No formal documents confirmed his partnership interest.

On September 2, 1994, Hy Realty executed a note and mortgage with Korea First Bank (KFB). Hy Realty received $2.8 million secured by a first mortgage on the Fort Lee property. On January 25, 1995, Hy Furniture entered a master revolving loan agreement for $1.8 million with KFB. On the same day, Seung Whan Kim signed a $300,000 promissory note with Hy Furniture listed as the borrower and plaintiff Jungil Lee listed as a guarantor. Jungil Lee signed the guaranty without legal representation because he trusted his wife's relatives. He explained it was the "Korean way" to "take your family's word."

Also on that day, plaintiffs invested $500,000 in Hy Furniture. In doing so, they placed a second mortgage on their home; KFB was the mortgagee. They also obtained a third mortgage on property owned by Hy Realty. Plaintiff Jungil Lee later learned that Hy Furniture was in financial disarray. He became concerned about the company's relationship with KFB, believing bank officers offered to help the firm in return for payoffs and other benefits. He learned

that defendant Chang Joo An, a brother of Chang Mi Kim, had a relationship with the bank. In August 1995, Jungil Lee left Hy Furniture and asked the Kims for the money they owed him, including the investment he had made in the business. Chang Mi Kim asked KFB to release Jungil Lee from his guarantee of the $300,000 credit line but the bank refused. When Hy Furniture defaulted on the credit line, KFB looked to Jungil Lee to satisfy the debt.

Sometime prior to February 1997, plaintiffs asked Idouchi to obtain copies of all loan documents relating to the Kims' companies and KFB. While Idouchi gathered this information, he learned that KFB was considering foreclosing on plaintiffs' Cresskill home. Although not admitted to practice law in New Jersey, he wrote to KFB on behalf of plaintiffs, ordered title searches and prepared a $500,000 mortgage on the Fort Lee property and a $300,000 mortgage on the Palisades Park property owned by Hy Realty. He also prepared a Uniform Commercial Code (UCC) lien on the Fort Lee property.

Following default by Hy Realty on the first and second mortgages on the Fort Lee property, KFB filed a series of foreclosure actions against the mortgagors, guarantors, and other interested parties. On May 5, 1997, KFB filed a foreclosure action against Hy Realty and the Kims on the first mortgage.[2] KFB also filed a notice of lis pendens against the Fort Lee property.

On May 19, 1997, KFB filed another foreclosure action

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[2] *Korea First Bank v Hy Design Realty Corp., Chang Mi Kim, Seung Hwan Kim, and State of New Jersey*, Docket No. F-7527-97.

against MVI and the Kims on the Fair Lawn property.[3] KFB also initiated a foreclosure action and obtained a judgment of foreclosure on the Palisades Park property. On July 23, 1997, KFB filed a complaint in foreclosure against plaintiffs as guarantors of the $300,000 loan to
Furniture. [4]Meanwhile, in mid-May 1997, Chang Mi Kim, on behalf of Hy Realty, granted a third mortgage to plaintiffs on the Fort Lee property in consideration of their guaranty obligation of the $1.8 million dollar revolving loan agreement with KFB, then in default. This mortgage was granted and recorded in June 1997 after the filing of the foreclosure action. Chang Mi Kim referred plaintiffs to *Korea First Bank v. Hy Design Realty Corp., Chang Mi Kim, Seung Hwan Kim, and State of New Jersey*, Docket No. F-7527-97. *Korea First Bank v. Maurizio Valentino, Inc.*, Docket No. F8502-97. *Korea First Bank v. Jun Gil Lee, Mi Hae Lee*, Docket No. F12230-97. William Policastro, a member of the firm of Kalebic, Policastro & D'Amico, for assistance with the foreclosure action against their home.

Policastro agreed to represent plaintiffs with the goal of minimizing their mortgage debt arising from the $1.8 million personal guarantee on the revolving credit line for Hy Furniture and the $300,000 mortgage against their house. He proposed a "workout" with the bank.

Meanwhile, a broker introduced Chang Joo An to Richard Steier as a potential purchaser of the Fort Lee property. Steier wanted to purchase the property for use as a mini-storage facility. On July 19, 1997, An and Steier

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[3] *Korea First Bank v Maurizio Valentino, Inc* , Docket No. F-8502-97

[4] *Korea First Bank v Jun Gil Lee, Mi Hae Lee*, Docket No. F-12230-97

entered into a "binding agreement" in which Steier agreed to purchase the first mortgage for an amount "up to $2,500,000," and secure the deed and title from Hy Realty and, in return, An would pay any "money items" that sellers did not pay such as "taxes, liens, citations, etc." An and Steier also agreed that: (1) each party would receive "45% of profits and losses after all bonafide expenses in the mini-storage project"; (2) An would have no other "interest or voice" in the property's development; and (3) Tomco Realty would receive a ten-percent share as broker.

Among other things, Steier required a discharge of the third mortgage held by plaintiffs. At that time, he wanted the option of discharging the mortgage in the event he acquired the bank notes quickly and did not want to proceed with the foreclosure. Policastro, who first heard about Steier in July 1997 from Chang Mi Kim, learned in August 2007 that Steier wanted the third mortgage removed.

In September 1997, An asked Jungil Lee if he would accept $200,000 in exchange for the discharge of the third mortgage. Jungil understood that An was negotiating with KFB to get Steier the lowest price possible to buy out the loan, and that An had a forty-five percent ownership interest in Hy Realty. He further understood that the $200,000 would come from the proceeds of the sale of the Fort Lee property. Because Jungil Lee believed that An was a co-owner of Hy Realty, he accepted the terms which became what the parties referred to as the side agreement.

On September 16, 1997, An brought a handwritten copy of the side agreement to the Policastro firm and asked Tyrone M. McDonnell[5] if his office would type it and make it

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[5] The Policastro firm became known as Kalebic, Policastro & McDonnell in early 1998

look "legal." An explained that he was Chang Mi Kim's brother. Policastro, who was at a conference in Chicago, delegated responsibility to the Policastro firm became known as Kalebic, Policastro & McDonnell in early 1998.McDonnell to handle the matter in his absence. McDonnell described himself as the "scrivener" who put the document into a legal format, but made no substantive changes. Afterwards, he faxed a copy to Jungil Lee. There was considerable debate at trial whether Jungil Lee was represented by McDonnell or Idouchi. Nevertheless, plaintiffs and An signed the side agreement, which contained the following terms:

> 1. Chang Joo An represents to Jun Gil Lee and Mi Hae Lee that he holds a forty five percent (45%) ownership interest in the property located at 550 Main Street, Fort Lee, New Jersey.
>
> 2. Chang Joo An agrees to pay $200,000.00 to Jun Gil Lee and Mi Hae Lee from the purchase of the property at the closing.
>
> 3. In exchange for the agreements and covenants herein granted by Chang Joo An, Jun Gil Lee and Mi Hae Lee hereby agree to immediately execute a Discharge of Mortgage relevant to a Third Mortgage held by Jun Gil Lee and Mi Hae Lee in an amount of $500,000.00.
>
> 4. If the transaction contemplated by the aforementioned Purchase Agreement and the Rider thereto is not completed for any reason, the parties agree that Chang Joo An has no obligation to make the payment herein required and Jun Gil Lee and Mi Hae Lee's Third

> Mortgage will be automatically restored to original status. (emphasis added to show handwritten changes).

That same day, plaintiffs also signed the discharge of mortgage.--McDonnell, who prepared the discharge at Policastro's request, also signed it. The discharge stated that plaintiffs' mortgage was paid in full, cancelled, and void. It did not include a provision requiring escrow of the discharge. After plaintiffs signed the side agreement and the discharge of mortgage, McDonnell took them into a conference room where Steier was waiting to enter into a purchase agreement with Hy Realty, and gave the discharge to Steier's attorney. McDonnell kept the side agreement.

Steier also executed a rider to the purchase agreement. The rider provided that simultaneously with the execution of the purchase agreement on September 16, 1997, the seller would deliver a deed to the property, affidavit of title, and corporate resolution, all of which would be held by the purchaser's attorney until the closing. The rider further provided that Steier would release $50,000 subject to various conditions, including "a duly executed [r]elease of the third lien in the amount of $500,000 presently encumbering the property." Steier agreed to purchase the assets from KFB, including the notes, which would release the Kims from personal liability.

The next day, Jungil Lee faxed to Idouchi a copy of the signed side agreement with a handwritten note on it. The note read:

> John, I asked him to insert, "Automatically -to original status." Mr. An (buyer) gave a contract . . . late last night. Do not wa[it] . . . for your new draft. Thank you.

Jungil Lee did not send Idouchi a copy of the discharge of mortgage. He initially believed that the closing would take place on September 16, 1997, but when he did not get paid, Jungil Lee understood that the closing would occur soon.

Policastro initially understood that An had a relationship with KFB which would benefit plaintiffs and the Kims. By September 1998, however, his view changed as An failed to follow through on many of his representations, and he heard from other people that An was not a man of his word.

Similarly, as the transaction progressed, Steier realized that An was not favored at the bank, that he was an "accomplished con[-]artist," who was "capable of anything," and that "very little" in their deal "turned out to be true." For example, An never disclosed such extra expenses as the KFB notes, or approximately $600,000 owed to another investor in Hy Realty, who evidently was given an interest in the buildings on the Fort Lee property and was threatening to take legal action if the sale to Steier took place. Moreover, Steier testified that An kept asking for more money during the course of the contract or he would "blow up this whole deal."

On April 29, 1998, Steier and his company, RAV Realty Associates, L.L.C. (RAV), entered into an agreement ("April 1998 agreement") with Hy Realty, An and Kim Realty Corp., Chang Mi Kim, Seung Whan Kim, and MVI to purchase the mortgage and note given by Hy Realty and the Kims to KFB on the Fort Lee property, and negotiate a resolution of the foreclosure action on the Fort Lee property. Steier agreed to pay attorney-defendants' outstanding legal fees, and incorporated a fee agreement into the April 1998 agreement.

On May 11, 1998, the court entered a stipulation of

settlement regarding the Fair Lawn foreclosure action (Docket No. F-8502-97), the An and Kim Realty Corp. foreclosure action (Docket No. F-7994-97), and the Fort Lee foreclosure action (Docket No. F-7527-97). A final consent judgment was entered in the Fair Lawn foreclosure action on May 19, 1998. It was recorded as a lien on June 16, 1998, released from the property on October 29, 1998, and paid on February 28, 2000.

Meanwhile, on August 19, 1998, KFB obtained a final judgment of foreclosure for $3,484,466.53 with interest from any future sheriff's sale of the Fort Lee property.[6] The foreclosure judgment extinguished any liens that existed on the property after its entry, including plaintiffs' third mortgage.

The following month, on September 2, 1998, Jungil Lee sent a letter to Policastro requesting: (1) proof of An's forty-five percent ownership of the property; (2) documentation on the relationship between the second mortgage and plaintiffs' Cresskill property; (3) information about what Policastro offered the bank to release plaintiffs from their personal guarantee of $1.8 million; and (4) help in getting back their Seoul property. Jungil Lee explained that he wanted Policastro to resolve the problems with the bank and that the letter expressed his "wishful thinking" that Policastro was doing his best even though plaintiffs had not heard from him.

One week later, Policastro wrote to KFB's attorney, Joan Lovell, regarding a workout of the Lee foreclosure action in which the bank demanded $367,184.54 plus interest. Policastro offered $100,000 to settle the second

---

[6] We rely on the court's decision of September 22, 2006, for the amount of the judgment.

mortgage in return for the release of plaintiffs' Cresskill residence. Also on September 9, 1998, approximately three weeks after entry of the judgment of foreclosure on the Fort Lee property, plaintiffs' discharge . We rely on the court's decision of September 22, 2006, for the amount of the judgment.
of mortgage on the Fort Lee property was recorded and the lien released.

In October 1998, Steier became aware of the UCC lien. Negotiations commenced between Steier and plaintiffs during which Steier proposed creating an escrow account of $125,000 against which plaintiffs could seek satisfaction. Plaintiffs rejected the offer. During discussion of this offer, plaintiffs learned through Idouchi that the discharge of the third mortgage had been recorded.

On October 23, 1998, the deed on the Fort Lee property was recorded. Sometime that month, Steier acquired the bank notes. The closing took place on October 29, 1998. Steier, through RAV, took title to the property from Hy Realty, and simultaneously sold a parcel to an entity called ECS, a company in the warehouse business, for $2.35 million. Steier then gave $2.25 million to KFB which released the bank's lien from the property. At closing, he also apparently obtained good title to the personal assets subject to the UCC lien, and paid An without any escrow arrangement. Ultimately, Steier sold the other three plots on the property as well.

No one acting on plaintiffs' behalf attended the closing. Policastro said it was not a closing in the "technical sense," but effectuated a purchase agreement. Plaintiffs never received any money from An. Following Steier's acquisition of the Fort Lee property, plaintiffs sought to settle the foreclosure action commenced by KFB on their home. During

this time they were represented by a series of attorneys. No settlement was reached and plaintiffs sold their home in 2000 and paid KFB from the proceeds.

On May 18, 1999, plaintiffs received formal notice that Steier was going to foreclose on their UCC lien. On June 9, 1999, Steier confirmed that the private sale was completed and that the UCC lien was, in effect, foreclosed. Sometime that year, Steier paid $75,000 to An in a settlement to ensure that he would "never hear from him again."

Jungil Lee retained another attorney in September 1999 to investigate why the mortgage had been discharged without payment in accordance with the side agreement.

When Jungil Lee had not received a satisfactory response following three inquiries over six months, plaintiffs sued the Policastro firm, An, the Kims, Hy Realty, and MVI. As noted, the only issue that proceeded to trial was the attorney negligence claim against attorney-defendants, and their third-party claim against Idouchi. The jury found that attorney-defendants and Idouchi were plaintiffs' attorneys or fiduciaries on September 16, 1997 (the date the side agreement and the discharge were executed), that they deviated from accepted standards of care by failing to include an escrow provision in the side agreement, and that the absence of this provision was the proximate cause of the loss of plaintiffs' third mortgage interest and rights under the side agreement. The jury apportioned liability ninety percent to attorney-defendants and ten percent to Idouchi and awarded $100,000 in damages. In his September 2006 written decision on the parties' post-trial motions, Judge Martinotti found that the evidence adduced at trial established the following facts:

> [Idouchi] prepared and recorded a Third Mortgage in the amount of $500,000[;]

. . . .

The Third Mortgage was filed on June 10, 1997[;]

. . . .

The [atorney] defendants were already representing the Kims in foreclosure proceedings[;]

[The side agreement] was typed in Policastro's office, but the substantive terms . . . were not negotiated[;]

[O]n September 16, 1997, [plaintiffs] asked [Idouchi] to review [the draft side agreement and he] suggested changes that were incorporated into the final version of the agreement and initialed by the parties[;]

. . . .

Plaintiffs did not agree to have these [attorney] defendants represent them until October 21, 1997[,] at which time they mailed part of the requested $2500 retainer based on the parties[']
conduct, there was an attorney client relationship prior to the execution of the retainer agreement[;]

Plaintiffs' mortgage rights were extinguished, not by the signed discharge of mortgage, but by a judgment of foreclosure on the property entered on August 19,
1998[;]

Plaintiffs' discharge of mortgage was actually recorded on September 9, 1998[;]

> The closing of the property took place between Hy [Realty], [KFB,] and Steier on October 29, 1998[;]
>
> An breached the . . . Side Agreement by defaulting on his payment of $200,000 to the plaintiffs.

The judge then determined as a matter of law that attorney-defendants' alleged negligence relating to the side agreement and their alleged failure to escrow the discharge of mortgage until payment of the $200,000 could not have been a proximate cause of any damages sustained by plaintiffs. He held that KFB filed the foreclosure proceedings and lis pendens prior to the recordation of the third mortgage and the foreclosure judgment entered in August 1998 extinguished plaintiffs' mortgage rights. In short, when the discharge of mortgage was filed in September 1998, the mortgage already had been extinguished by operation of law. He also held that the opinion offered by plaintiffs' expert failed to establish the requisite nexus between the alleged negligence and plaintiffs' damages.

On appeal, plaintiffs argue that they established that attorney-defendants failed to protect their interests and that failure proximately caused damage to them. Thus, they argue that the trial judge erred by granting attorney-defendants' motion for JNOV. We disagree.

The standards for determining a Rule 4:40-1 motion for judgment and a Rule 4:40-2 motion for JNOV are the same, and apply both at trial and on appeal. *Frugis v. Bracigliano*, *N.J.* 250, 269 (2003); *Boyle v. Ford Motor Co.*, 399 *N.J. Super.* 18, 40 (App. Div.), certif. denied, 196 *N.J.* 597 (2008); *Velazquez v. Jiminez*, 336 *N.J. Super.* 10, 30 (App. Div. 2000),

aff'd, 172 *N.J.* 240 (2002). The court must accept as true all the evidence which supports the position of the nonmoving party and, according that party the benefit of all legitimate inferences, must deny the motion if reasonable minds could differ. *Zive v. Stanley Roberts, Inc.*, 182 *N.J.* 436, 441-42 (2005); *Dolson v. Anastasia*, 55 *N.J.* 2, 5 (1969); *Velazquez*, *supra*, 336 *N.J. Super.* at 30; Pressler, Current N.J. Court Rules, comment 1 on R. 4:40-2 (2009). "The trial court is not concerned with the worth, nature or extent (beyond a scintilla) of the evidence, but only with its existence, viewed most favorably to the party opposing the motion." *Dolson*, *supra*, 55 *N.J.* at 5-6. The test's purpose is to ensure that the jury resolves disputed factual matters. *Lewis v. Am. Cyanamid Co.*, 155 *N.J.* 544, 567 (1998). As the Court explained in *Tomeo v. Thomas Whitesell Construction Co.*, 176 *N.J.* 366, 370 (2003) (quoting *Brill v. Guardian Life Ins. Co. of Am.*, 142 *N.J.* 520, 536-37 (1995)):

> "[A] dismissal under Rule 4:37-2(b), Rule 4:40-1, Rule 4:40-2 or for failure to allege or prove a prima facie case, does not unduly intrude into the province of the jury based on the evidence."

A legal malpractice action is a variation on the tort of negligence relating to an attorney's representation of a client. *Garcia v. Kozlov, Seaton, Romanini & Brooks, P.C.*, 179 *N.J.* 343, 357 (2004); *Sommers v. McKinney*, 287 *N.J. Super.* 1, 9 (App. Div. 1996). To establish malpractice, a plaintiff must prove: (1) the existence of an attorney-client relationship creating a duty of care by the defendant attorney; (2) the breach of that duty by the defendant; and (3) proximate causation of the damages claimed by the plaintiff. *Jerista v. Murray*, 185 *N.J.* 175, 19091 (2005). An attorney is only liable for a client's loss if that loss is proximately caused by the attorney's legal malpractice. *2175 Lemoine Ave. Corp. v.*

Finco, Inc., 272 *N.J. Super.* 478, 487 (App. Div.), certif. denied, 137 *N.J.* 311 (1994).

To establish proximate cause, a "plaintiff must present evidence to support a finding that defendant's negligent conduct was a 'substantial factor' in bringing about plaintiff's injury, even though there may be other concurrent causes of harm." *Froom v. Perel*, 377 *N.J. Super.* 298, 313 (App. Div.) (quoting *Conklin v. Hannoch Weisman*, 147 *N.J.* 395, 419 (1996)), certif. denied, 185 *N.J.* 267 (2005). In a case involving transactional legal malpractice, the evidence must establish that the negligence was a substantial factor in bringing about the loss of a gain or benefit from the transaction. *Id.* at 315. Where a plaintiff alleges a loss in a particular transaction because an attorney failed to take steps to protect his or her interest, the plaintiff must present evidence that, even in the absence of the attorney's negligence, the other parties to the transaction would have recognized the plaintiff's interest and the plaintiff would have derived a benefit from it. Ibid.

The client, therefore, has the burden to show what injuries were suffered as a proximate consequence of the attorney's alleged breach of duty. *2175 Lemoine Ave., supra*, 272 *N.J. Super.* at 487-88. That burden will be satisfied only by "a preponderance of the competent, credible evidence" and not by mere "'conjecture, surmise or suspicion.'" *Id.* at 488 (quoting *Long v. Landy*, 35 *N.J.* 44, 54 (1961)). As this court explained in *2175 Lemoine Avenue, supra*, 272 *N.J. Super.* at 488, "the measure of damages is ordinarily the amount that a client would have received but for the attorney's negligence."

Expert testimony is required in professional malpractice cases where the matter to be addressed is so esoteric that the average juror could not form a valid judgment as to whether the professional's conduct was

reasonable. *Sommers, supra*, 287 *N.J. Super.* at 10. In rare legal malpractice cases, expert testimony is not required where the duty of care to a client is so basic that it may be determined by the court as matter of law. Ibid. Moreover, "[e]xpert testimony may not be appropriate or necessary to establish proximate cause in every legal malpractice case, particularly where the causal relationship between the attorney's legal malpractice and the client's loss is so obvious that the trier of fact can resolve the issue as a matter of common knowledge." *2175 Lemoine Ave., supra*, 272 *N.J. Super.* at 490.

In *2175 Lemoine Avenue*, the trial court held that an attorney had committed legal malpractice in a loan transaction, and awarded her former client damages in the amount of $111,283. *Id.* at 483-85. In connection with the transaction, the attorney prepared purchase options which were declared invalid because they violated the New Jersey Real Estate License Act. *Id.* at 482. While this court agreed that the attorney was negligent, we held that the trial court erred in awarding damages because the client failed to prove that the attorney's negligence was a proximate cause of its loss. *Id.* at 487. Although the plaintiff argued on appeal that there were ways the attorney could have legally structured the transaction, this court held that the client failed to present expert testimony in support of this claim. *Id.* at 490. Moreover, even if the transaction could have been legally structured, we concluded there was no evidence to show that the other parties were willing or able to do so. *Ibid.*

In another legal malpractice case, *Lamb v. Barbour*, 188 *N.J. Super.* 6, 9 (App. Div. 1982), certif. denied, 93 *N.J.* 297 (1983), the trial court found an attorney, who represented the plaintiffs in the acquisition of a business that failed within two months, was professionally negligent. The court based its finding on a wide range of shortcomings

relating to the attorney's "duty to furnish advice and guidance and to safeguard his client's legal position." *Id.* at 10. These shortcomings included the attorney's failure to: (1) tell the plaintiffs of his doubts concerning the sufficiency of their judgment, skill and experience to operate a business of that size; (2) warn the plaintiffs that the sellers might have mentioned unreported income to make the business seem more attractive; (3) caution the plaintiffs that the failure to report income could result in a liability to the Internal Revenue Service for back taxes and penalties; and (4) suggest that the plaintiffs acquire a more current financial statement, an accounting of the company's books, and an examination of its physical equipment. *Id.* at 10 The court further found that the attorney failed to obtain UCC and judgment searches, check state and federal tax liabilities, and verify customer lists and accounts payable. *Id.* at 11. The trial court concluded that if the attorney had properly performed his duties, the plaintiffs would have been able to make an informed decision as to whether they should buy the business. *Ibid.*

This court, however, held that even if the attorney was negligent, there was no evidence to support a finding of proximate cause. *Id.* at 12. We stated:

> Most conspicuous is the absence of testimony by either of plaintiffs as to any circumstances reasonably to be hypothesized under which they could have been dissuaded from completing the transaction. It should not be lightly assumed that these young people would have been easily discouraged from acquiring for a net cash investment of only $4,000 a business which as we said earlier, grossed annual revenues of more than $1,000,000 and which had been successfully operated for approximately 16

years. (*Id.* At 12-13.)

More recently, in Froom, supra, 377 *N.J. Super.* at 309, the plaintiffs, including a broker and his real estate development company, brought a legal malpractice action against a law firm and others in connection with the acquisition of a shopping center property. The development company had entered into an agreement with an experienced investor and developer (defendant investor) under which the latter would provide all the money to acquire and develop the property and, in return, the development company, which located the property, performed preliminary research and investigations, prepared a demographic profile report, and retained an architect, would receive a fifty percent non-dilutable ownership interest in the project. *Id.* at 302.

The plaintiffs advised their lawyer that the defendant-investor was participating in the transaction. *Id.* at 311. The lawyer then prepared draft agreements which initially identified the plaintiffs and defendant-investor as the purchasers, and addressed his engagement letter to both parties. *Ibid.* Over time, a dispute arose as to whether the attorney and his law firm continued to represent the development company. Ibid. Ultimately, the plaintiffs lost their fifty percent interest in the project. *Id.* at 308-09.

The plaintiffs claimed that the law firm defendants were negligent in failing to protect their interests. *Id.* at 315. Their expert testified that the law firm owed the plaintiffs a duty of loyalty, that it could not represent others in conflict with the plaintiffs' interests, and that it had a responsibility to advise the plaintiffs about another company's role in the project. *Id.* at 316. When asked if the law firm proximately caused the plaintiffs' damages, the expert replied only that, "[t]hey committed malpractice" and "caused the damages." *Ibid.* The jury returned a verdict for $2.7 million against the

law firm defendants, and the court denied the law firm's motions for a new trial and JNOV. *Id.* at 309. This court held that the evidence was insufficient to support a finding by the jury that professional negligence by the law firm defendants was a proximate cause of the development company's loss of its purported interest in the project. *Id.* at 315. Even if the law firm had acted to protect the plaintiffs' interests, we concluded that a rational jury could not find that the other parties to the transaction would have agreed to give the development company a fifty percent ownership interest in the project when it made no financial contribution to the property's acquisition or development. *Id.* at 315-16.

We further concluded that the testimony of the plaintiffs' expert was "patently insufficient" to establish the requisite causal connection between the alleged legal malpractice and the damages allegedly sustained by the plaintiffs, and that his conclusions were "net opinions" unsupported by any factual evidence. *Id.* at 317. This court rejected the plaintiffs' contention that expert testimony was not necessary, finding the transaction was an "undoubtedly" complex real estate acquisition and development. *Id.* at 318. We held "jurors could not be expected to know, based on their own common knowledge and experience, whether sophisticated investors would be willing to invest in the acquisition and development of the property and allow the development company to retain a 50% interest while making no monetary contribution to the project." *Ibid.* Moreover, even if expert testimony was not required, this court concluded that the testimony of fact witnesses failed to provide an evidential foundation for a finding that the other parties to the transaction would have recognized the development company's ownership interest or would have acquiesced to giving it any percentage of the project. *Id.* at 318-20; *see also, Brach, Eichler, Rosenberg, Silver, Bernstein, Hammer & Gladstone, P.C. v. Ezekwo*, 345 *N.J. Super.* 1, 15

(App. Div. 2001) (holding the trial court properly dismissed the legal malpractice claim in a medical malpractice action where the defendant had no expert testimony to establish proximate causation).

The record below contains sufficient evidence to support the jury's findings that attorney-defendants and Idouchi had attorney-client relationships with plaintiffs, and that they deviated from the accepted standard of care by failing to include an escrow provision in the side agreement. The issue here, however, is whether the failure by attorney-defendants and Idouchi to include the escrow provision was a proximate cause of plaintiffs' damages.

Jungil Lee's testimony and the language of the side agreement make clear that the $200,000 would come from An's share of the proceeds from the sale. Thus, the question is whether attorney-defendants were negligent by failing to include a provision in the side agreement which would have held the discharge of mortgage in escrow until the closing, when the money would have been available to An for release.

New Jersey is a "race-notice" jurisdiction, where the party who first records an instrument will prevail so long as that party had no actual knowledge of another party's previously-acquired interest. *Cox v. RKA Corp.*, 164 *N.J.* 487, 496 (2000). Generally, parties are charged with constructive notice of instruments that are properly recorded. *Ibid.*; *see N.J.S.A.* 46:22-1.[7] Thus, under the statute's scheme, a

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[7] Under *N.J.S.A.* 46:22-1, until a deed or instrument is duly recorded in the approbate county recording office, it shall be

> void and of no effect against subsequent judgment creditors without notice, and against all subsequent bona fide purchasers and mortgages for valuable consideration, not

recording purchaser divests a former non-recording title owner and prevents a subsequent purchaser from divesting him or her of title. *Cox, supra*, 164 *N.J.* at 496-97 (citing *Palamarg Realty Co. v. Rehac*, 80 *N.J.* 446, 453 (1979). The scheme's underlying purpose is to permit purchasers to rely on the record title, and 7 Under *N.J.S.A.* 46:22-1, until a deed or instrument is duly recorded in the appropriate county recording office, it shall be to purchase and hold title to lands with confidence. Id. at 496 (citing *Palamarg, supra*, 80 *N.J.* at 453). Pursuant to the lis pendens statute, *N.J.S.A.* 2A:15-6 to 15-17, a notice of lis pendens must be "filed and recorded for subsequent interest takers to have constructive notice of the pendency of a lawsuit and to take subordinate to the rights the plaintiff derives in the outcome of the litigation." *Manzo v. Shawmut Bank, N.A.*, 291 *N.J. Super.* 194, 199 (App. Div. 1996). Further, under *N.J.S.A.* 2A:50-30, in any action where a mortgage is unrecorded prior to the filing of the foreclosure complaint, the person "shall be bound by the proceedings in the action so far as such property is concerned, in the same manner as if he had been made a party to and appeared in such action, and the judgment therein had been made against him as one of the defendants therein." Thus, under *N.J.S.A.* 2A:50-30, if a mortgage is unrecorded prior to the filing of the foreclosure complaint, the holder of the unrecorded interest is bound by the foreclosure judgment as if it had been made a party. *PNC Bank v. Axelsson*, 373 *N.J. Super.* 186, 191 (Ch. Div. 2004).

Here, KFB filed the foreclosure proceeding and lis

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having notice thereof, whose deed shall have been first duly recorded or whose mortgage shall have been first duly recorded or registered; but any such deed or instrument shall be valid and operative, although not recorded, except as against such subsequent judgment creditors, purchasers and mortgages.

pendens in May 1997, prior to plaintiffs' recordation of the third mortgage in June 1997. The bank, therefore, was not required to name plaintiffs in the foreclosure proceedings. Because plaintiffs were bound by the foreclosure judgment pursuant to *N.J.S.A.* 2A:50-30, their third mortgage was extinguished as a matter of law well before the discharge was filed. Thus, the court correctly found that plaintiffs could not sustain the legal malpractice action because attorney-defendants' alleged negligence relating to the side agreement and failure to include an escrow provision for the discharge of mortgage payment could not have been a proximate cause of their damages.

Moreover, expert testimony was required on the issue of proximate cause because this case involved transactional legal malpractice and the interrelationship between a discharge of mortgage, a judgment of foreclosure, and a side agreement. *Froom, supra*, 377 *N.J. Super.* at 318; *2175 Lemoine Ave., supra*, 272 *N.J. Super.* at 490. Plaintiffs' expert opined that attorney-defendants failed to follow standard practice in New Jersey to hold the signed discharge of mortgage in escrow and to release and file it only after the money was actually tendered. The expert explained that without an escrow provision, the property could be transferred free of any lien, and there would be no mechanism to automatically restore the third mortgage to its original status if the $200,000 was not paid. Thus, he believed that attorney-defendants' failure to follow "the standard practice escrow requirement" proximately caused plaintiffs' loss by permitting the transfer of the property without payment of the promised funds.

Nonetheless, plaintiffs' expert acknowledged that the judgment of foreclosure of the first and second mortgages in August 1998 extinguished plaintiffs' third mortgage. The following colloquy took place between counsel for attorney-

defendants and the expert as to the foreclosure judgment's effect on the third mortgage:

> Q Basically, when the final judgment of foreclosure occurred in August 1998, that mortgage was gone, correct?
>
> A Yeah, and the agreement didn't deliver what it promised, that some lien against the property would be retained by Lee if they didn't get the 200,000.
>
> . . . .
>
> Q What happened on August 19, '98?
>
> A The judgment that had been sought by Korea First Bank and which was purchased by St[e]ier was entered on the record of Superior Court.
>
> Q And that extinguished the mortgage.
>
> A That extinguished the mortgage which was not automatically restored, the way the Lee's [sic] were led to think it would be.
>
> Q Okay. So after August of 1998, they could not have revived any mortgage, correct?
>
> A That original mortgage could not be restored —
>
> Q And prior -A -- after the judgment of foreclosure.

Q Right.

A. Because the judgment of foreclosure extinguishes the mortgage.

Q Right. So in August 1998, that mortgage was extinguished, correct?

A By virtue of the judgment of foreclosure.

Q Right. And the filing of the discharge of mortgage a month later didn't make any difference did it?

A It's clean up at that point, to change the contemplated . . . deal.

Q But there was nothing to extinguish because it was gone a month before, correct?

A Yes.

Q So if the mortgage had been held in escrow until the closing in October of 1998 and An balked at that time would it have changed anything?

A Would St[e]ier have gone ahead with the deal? I don't know.

When asked whether any obligation remained with respect to the money, this exchange took place between counsel for attorney-defendants and plaintiffs' expert:

Q So when you talk about the obligation still exists, the lien is gone, but the obligation still

exists, you're referring to that; that is the obligation under the promissory note and the guarantee, correct?

A I'm referring to that, yes, and I'm referring to -- --

Q Chang Joo An's obligation under the side agreement, correct?

A Correct.

Q So --

A Neither of which is extinguished by the foreclosure judgment.

Gary L. Falkin, expert for attorney-defendants, similarly testified that the foreclosure judgment "wiped out" plaintiffs' third mortgage.

Thus, plaintiffs' contention that they would not have relinquished their rights to the $500,000 third mortgage if they knew they would not receive the $200,000 at closing misses the point. Likewise unpersuasive is their argument that the outcome would have been very different if the money was placed in escrow. Indeed, plaintiffs' reliance on the dissenting opinion in *VRG Corp. v GKN Realty Corp.*, 135 *N.J.* 539, 557 (1994) (Stein, J., dissenting), and on *Tabaac v. Atlantic City*, 174 *N.J. Super.* 519, 528 (Law Div. 1980), is misplaced, because these cases involved the escrow of unpaid real estate commissions and part of a purchase price to secure an agreement, respectively. Further, plaintiffs argued at trial, and now argue on appeal, that Steier required the discharge as a precondition to the closing. If plaintiffs had not signed the side agreement, they claim it was "highly

likely that the deal would not have gone through . . . because Mr. Steier insisted that the third mortgage be extinguished before any deal was consummated."

Judge Martinotti considered this claim speculative and not supported by competent evidence. We agree. To the contrary, Steier testified that the discharge of the third mortgage was a condition of his contract with An, but had nothing to do with his agreement with KFB. He explained that, at the time he signed the purchase agreement in September 1997, he needed to keep his options open. If he acquired the bank notes and project approvals quickly, and did not want to proceed with the foreclosure, he would need the discharge. By September 1998, however, the discharge was no longer important because the bank had already obtained a judgment of foreclosure. Thus, the evidence in the record does not support plaintiffs' claim that the discharge was a precondition to the closing.

We, therefore, affirm the order granting attorney-defendants' JNOV. The remaining issues raised by plaintiffs are without sufficient merit to warrant further discussion in a written opinion, Rule 2:11-3(e)(1)(E), or need not be addressed due to our affirmance of the JNOV. Affirmed.[8]

I hereby certify that the foregoing is a true copy of the original on file in my office.
/s/ Clerk of the Appellate Court

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[8] This opinion disposes of all outstanding motions to dismiss.

LAW DIVISION : BERGEN COUNTY
Docket No: BER-L-6629-03
Civil Action

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190 Moore Street, Suite 272
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Attorney for Plaintiffs

FILED
DEC 20 2006
NEW JERSEY
Brian R. Martinotti
J.S.C.

---x

MIHAE LEE and JUNGIL LEE,

Plaintiffs,

V.

WILLIAM J. POLICASTRO,
TYRONE M. MCDONNELL,
KALEBIC, POLICASTRO & D'AMICO
KALEBIC, POLICASTRO &MCDONNELL,
CHANG JOO AND, CHANG MI KIM,
SEUNG WHAN KIM,
AN AND KIM REALTY
HY DESIGN REALTY CORP.,
and MAURIZIO VALENTINO, INC.,

Defendants.

---x

FINAL JUDGMENT WITH
Order granting entry of default
and default judgment against
the Kim Family Defendants

Upon the plaintiffs' motion for entry of default and default judgment against the Kim Family Defendants, and for good case;

It is on this 20 day of December 2006

ORDERED that plaintiffs' motion for entry of default against defendants CHANG JOO AN, CHANG MI KIM, SEUNG WHAN KIM, AN AND KIM REALTY, HY DESIGN REALTY CORP., and MAURIZIO VALENTINO, INC., is hereby granted;

ORDERED that plaintiffs' motion for default judgment against defendants CHANG JOO AN, CHNAG MI KIM, SEUNG WHAN KIM, AN AND KIM REALTY, HY DESIGN REALTY CORP., and MAURIZIO VALENTINO, INC., is hereby granted in the sum of $ _____ to be paid by them jointly and severally to plaintiffs; with prejudgment interest in the sum of $_____; for a total of $_____; and

ORDERED that this constituted the final judgment of the Court in this action

/s/ Hon. Brian R. Matinotti, JSC

X opposed
_ unopposed
LEE V. POLICASTRO
PLAINTIFF'S MOTION ENTER DEFAULT AND FOR JUDGMENT BY DEFAULT
L-6629-03
RETURN: 12/15/06

RIDER TO ORDER

FINDINGS OF FACT/CONCLUSION OF LAW

- This motion arises out of a legal malpractice matter that was tried to conclusion on June 30, 2006. The alleged legal malpractice occurred as a result of defendants failing to escrow a discharge of mortgage which was released to a non-party to this lawsuit without receiving a $200,000 payment as consideration for the discharge.
- the mortgage that formed the subject matter of the lawsuit was issued to the plaintiff's in order to secure a debt owed to the plaintiffs by Chan Mi Kim and Seung Whan Kim.
- Neither of the Kims were listed as defendants on the verdict sheet that was submitted to the jury.
- The matter was tried to conclusion on June 30, 2006. The jury apportioned 90% liability to the defendants and 10% liability to the third -party defendants.
- Both the defendants and the third party defendants moved for judgment notwithstanding the verdict. Thus Court granted the defendant;'s motion in order and an accompanying written opinion both dated September 22, 2006. That Order dismissed Plaintiffs' complaint with prejudice.
- Plaintiffs have now made a Motion to Enter Default and for Default Judgment against Defendants Chang Joo An, Chang Mi Kim, Seung Whan Kim, An and Kim Realty, Hy Design Realty Corp. And Maurizio Valentino, Inc.

DECISION

After a review of the facts, legal analysis submitted by way of Plaintiff's certification submitted on November 17, 2006 and Defendants' letter brief submitted on November 9, 2006, November 30, 2006 and December 5, 2006, Plaintiff's Motion to Enter Default and Default Judgment is hereby DENIED.

- The Court finds that the plaintiffs made no effort to include the Kims on the verdict sheet at the time of trial.
- The Court further finds that by attempting to pursue a default against the Kims after the matter has been tried to conclusion and a judgment notwithstanding the verdict has been entered dismissing the plaintiff's complaint with prejudice is inappropriate.
- The Court finds that the prospect of obtaining a default judgment against the Kims at this late date for ana mount fo damages which may differ from that found by the jury in its verdict would be prejudicial to the defendants plaintiff chose to incorporate into the verdict sheet.
- Case law in new Jersey has established that, in the proper context, where there has been an inordinate delay ins seeking judgment and resulting prejudice has occurred, the court may deny the entry of final judgment by default. *W.S.FreyCo.,Inc v. Heath*, 158 *N.J.* 321,328 (1999).
- The Court finds that the same principles outline in W.S. Frey Co. Was clearly longer than in the instant case, the case at bar was nevertheless tried to conclusion before the jury. The Court therefore finds that the resulting prejudice to the defendants who were included in the verdict sheet would be no less severe.

- The Court finds that the entry of default, or any prospective judgment by default. Is particularly inappropriate as the Order that was entered on September 22, 20006 dismissed the Plaintiffs' complaint with prejudice, and was thus final as to all parties and all issues.
- The Plaintiffs' Motion to Enter Default and for Judgment by Default is denied.

Superior Court of New Jersey
LAW DIVISION : BERGEN COUNTY
DOCKET No.: BER-L-6629-3

Civil Action

MIHAE LEE AND JUNGIL LEE

Plaintiff

vs.

WILLIAM J. POLICASTRO, et al.

Defendant

FILED
SEP 22 2006
BRIAN R. MARTINOTTI, J.S.C.

WILLIAM J. POLICASTRO, et al.
Defendants/Third Party Plaintiffs

vs.

JOHN IDOUCHI, ESQ. and
GALLO GEFFNER FENSTER, P.C.
Third Part Defendants

ORDER

This matter having come before the Court, on post judgment motions (a jury verdict being entered on June 30, 2006) filed by defendants, plaintiff and third party defendants, and the Court having reviewed the motion papers, certifications and exhibits, opposition thereto, replies and responses, and having heard argument of counsel on August 25, 2006, and for the reason set forth in the court's memorandum of decision attached hereto,

IT IS on this 22 day of September, 2006;

ORDERED,

1. Defendant's motion for Judgment Notwithstanding The Verdict is hereby GRANTED.
2. The jury verdict of June 30, 2006 is vacated.

3. Plaintiffs' complaint be and hereby is dismissed with prejudice.
4. Defendant's motion or attorney fees, expenses and costs pursuant to the Offer of Judgment rule is hereby DENIED.
5. All other relief requested in plaintiffs' motion and third party defendants motion is hereby DENIED.

/s/ Brian R. Martinotti, J.S.C.